Calendar No. 668

97TH CONGRESS, 2d Session } SENATE { REPORT No. 97-472

PERMITTING INDIAN TRIBES TO ENTER INTO CERTAIN AGREEMENTS FOR THE DISPOSITION OF TRIBAL MINERAL RESOURCES, AND FOR OTHER PURPOSES

JUNE 10 (legislative day, JUNE 8), 1982.—Ordered to be printed

Mr. COHEN, from the Select Committee on Indian Affairs, submitted the following

REPORT

[To accompany S. 1894]

The Select Committee on Indian Affairs, to which was referred the bill (S. 1894) to permit Indian tribes to enter into certain agreements for the disposition of tribal mineral resources, and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill as amended do pass.

The amendment in the nature of a substitute is as follows:

Strike out all after the enacting clause and insert:

That (a) any recognized Indian tribe, band or other group of Indians subject to the jurisdiction of the United States may enter into any joint venture agreement, operating agreement, production sharing agreement, service agreement, managerial agreement, lease agreement, or other agreement approved by the Secretary of the Interior (hereinafter referred to as the "Secretary") for the disposition of oil and gas, geothermal, coal, or other energy or non-energy mineral resources, owned by a tribe, or for the sale of the production of such tribal minerals. Any such agreement shall be for such term and be subject to such conditions as the Secretary may require by regulation.

(b) Unless the Secretary finds that an agreement is not in the best interest of the tribe, the Secretary shall approve such agreement wtihin (1) 180 days of its submission to him or (2) 30 days after compliance, if required, with Sec. 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332, or any other requirement of law, whichever is later. Any party to such agreement may enforce the provisions of this subsection pursuant to 28 U.S.C. 1361.

(c) Whenever the Secretary approves or disapproves an agreement pursuant to subsection (a), he shall state his findings in writing at least thirty days before making his decision. Such findings shall be made availab'e to the tribe.

(d)(1) Upon Secretarial disapproval of such agreement, the parties involved therein shall have standing, without regard to the requirements of the Administrative Procedures Act, to bring a cause of action in federal district court.

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(2) The district court of the United States shall have jurisdiction to review the Secretary's disapproval action and shall determine the matter *de novo*. The burden is on the Secretary of the Interior to sustain his action.

(3) Except as to other cases the court considers of greater importance, proceedings before the district court, as authorized by this section, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

(4) The court may assess against the United States reasonable attorney fees and other reasonable litigation costs incurred in any case under this section in which the complainant has substantially prevailed.

SEC. 2. Individual Indians owning trust or restricted minerals may join with a tribe in an agreement entered into pursuant to section 1 of this Act, subject to the approval of the Secretary of the Interior.

SEC. 3. The Secretary shall review, within 90 days of enactment of this Act, any existing non-lease agreement approved between June, 1975 and April, 1981, to determine if they comply with the purposes of this Act and any other provisions of law.

SEC. 4. Upon the request of any Indian tribe or any individual Indian owning trust or restricted mineral resources, the Secretary of the Interior shall provide qualified, independent, expert advice to such tribe or individual for determination of potential mineral values, for social, environmental and economic analyses, for legal assistance, and for such other technical services that such tribe or individual may request relating to the valuation, development, production and sale of such minerals as are defined in Section 1 of this Act. Costs for such services may be reimbursed pursuant to the provisions of the first section of the Act of February 14, 1920 (41 Stat. 415; 25 U.S.C. 413), as amended.

SEC. 5. Nothing in this Act shall affect the validity of any lease approved or hereafter approved pursuant to the Act of May 11, 1938, as amended (52 Stat. 347; 25 U.S.C. 396a et. seq.).

SEC. 6. Within one hundred and eighty days of the date of enactment of this Act, the Secretary of the Interior shall promulgate rules and regulations to facilitate implementation of this Act. The Secretary shall, to the extent practicable, consult with national and regional Indian organizations and Tribes with expertise in mineral development both in the initial formulation of rules and regulations and any future revision or amendment of such rules and regulations.

PURPOSE

S. 1894 is designed to provide Indian tribes flexibility for the development and sale of their mineral resources. The objective is two-fold: first, to further the policy of self-determination and second, to maximize the financial return tribes can expect for their valuable mineral resources.

BACKGROUND AND NEED

An Indian tribe's ability to negotiate agreements for minerals that it owns may be limited by certain statutes. The Secretary of the Interior has approved several non-lease venture agreements. However, no new agreements have been approved since April, 1981, pending enactment of legislation to clarify tribal authority to enter into agreements other than leases under the 1938 Indian Mineral Leasing Act.

Statutes

The Non-Intercourse Act of the Indian Trade and Intercourse Act of 1970 (25 U.S.C. 177) says that tribes may not alienate an interest in land except when authorized to do so by treaty or an Act of Congress. Unsevered minerals of all kinds are deemed to be an interest in land and, therefore, cannot be sold without appropriate authorization.

25 U.S.C. 81 governs services contracts, including services connected with Indian lands. Section 81 could be read to authorize a services con-

tract to extract minerals for a tribe, though it does not specifically authorize the sale of minerals. The only regulations promulgated pursuant to this section are those governing contracts with tribes for attorneys service. (25 C.F.R. 72).

The 1934 Indian Reorganization Act (IRA) authorized the tribes to establish Federally chartered business corporations and to give tribal corporations authority to lease tribal lands up to ten years. The provision applies only to those tribes that that organized under IRA and subsequently were granted a corporate charter. Many Indian tribes did not do so. Further, tribal corporations are limited to "leases" and for "ten years". Additionally, there is a Solicitor's Opinion in the Department of the Interior to the effect that a tribal business corporation cannot convey an interest in tribal minerals unless the tribe first conveys the land to the corporation.

The Indian Mineral Leasing Act of 1938 (25 U.S.C. 396 (a)), permits tribes to lease their trust lands for mining purposes. The statutory lease term is ten years and for so long thereafter as minerals are produced in paying quantities. Leases are subject to the approval of the Secretary of the Interior. Section 396b requires that *oil and gas leases* be offered for sale by advertisement followed by competitive bidding. Regulations implementing the 1938 Act are found in 25 C.F.R. 171.

The Act of 1909 (25 U.S.C. 396) authorized mineral leases of *allotted lands* (those owned by individual Indians but held in trust by the United States). Regulations are found in 25 C.F.R. 172. Authority for oil and gas leasing of allotted lands is arguably broader than that for tribal lands but allotted minerals are restricted by regulation to the same advertising and competitive bidding procedures that pertain to tribal lands.

The 1938 Act has been treated as the basic authority for mineral leases of tribal lands. While leases for minerals other than oil and gas are not restricted by statute to competitive bidding, regulations provide that this process be used for all minerals unless the Secretary grants advance permission to the tribe or individual Indian owner to *negotiate* for a lease to dispose of these other minerals. If the Secretary rejects the negotiated agreement, then the minerals may be advertised for bid. In any case, the statute limits leases for all minerals to ten-year terms and for as long as they produce in paying quantities. Thus the need for S. 1894 arises by focusing on two main concerns: the 1938 Act limits development of oil, gas and other minerals to "leases"; and, oil and gas leases are further restricted to a regulated advertisement/competitive bidding procedure.

The statutory scheme is designed to protect Indian tribes and allottees against exploitation of their mineral estates. However, tribes are presently developing more beneficial arrangements for mineral sales through negotiated agreements.

Joint venture and other agreements

Several tribes are now participating directly in mineral production through joint venture equity partnerships with energy production companies. Other tribes have recently submitted nonlease venture contracts for mineral development to the Secretary of the Interior for approval but because of questions about tribal authority to enter into

such agreements, the agreements are being held in abeyance pending enactment of legislation like S. 1894.

The Department's position is that, since the 1938 Act speaks only of development by lease, the possibilities for tribal joint ventures, partnerships, and other non-lease ventures common in mineral development today are limited. Many tribes believe they are able to determine which kinds of contracts are in their own best interest and to tailor agreements to their own particular needs. Such ventures can give a tribe greater participation in the profits of the venture and a larger role in managing the resource development, as well as Indian employment and training opportunities at all levels.

Of course, the Secretary, as trustee, needs to maintain a strong role in monitoring agreements for overall fairness and terms. However, tribal autonomy and self-determination certainly should include the right to negotiate terms of contracts like any owner of valuable resources. Non-lease ventures can provide a variety of opportunities that would benefit the long-term tribal socio-economic development such as involvement in resource management, training of tribal members for management positions, and participation in the decision-making process. For many tribes, their financial security remains underground in the form of undeveloped and untapped oil, coal, gas, geothermal and other resources.

LEGISLATIVE HISTORY

S. 1894 was introduced by Senator Melcher on November 30, 1981, and referred to the Select Committee on Indian Affairs. The Committee held a hearing in Billings, Mont., on February 12, 1982, at which testimony was received from many western tribes with energy resources as well as two energy companies. A second hearing was held in Washington, D.C., on March 16, 1982. The Departments of the Interior and Justice testified in favor of the bill and other witnesses included representatives of tribes, allottees, and energy development companies.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

The Select Committee on Indian Affairs, in open business session on May 13, 1982, with a quorum present recommends by unanimous vote that the Senate pass S. 1894 as amended.

COMMITTEE AMENDMENTS

The Committee recommends an amendment in the nature of a substitute.

SECTION-BY-SECTION ANALYSIS AND EXPLANATION OF COMMITTEE AMENDMENTS

S. 1894 is designed to provide much greater flexibility in the conditions and manner under which tribes can enter into mineral resource development. Regulations should provide guidelines on the procedures under which agreements will be approved, with emphasis on fair and reasonable financial returns. Regulations can be flexible to respond to new requirements or to adapt to changes in the mineral industry. The

Secretary's trust responsibility would remain intact and the bill requires the Secretary to use a "best interest" test in reviewing tribal agreements. The 1938 Indian Mineral Leasing Act would be unchanged by S. 1894, so that tribes that prefer to use the existing competitive leasing process can do so.

The Secretary approved some non-lease type ventures between January 1, 1975, and April 1981, either under a tribe's general contracting authority or under the premise that "leases" in today's mineral industry parlance can mean much more than the traditional BIA lease form. However, for oil and gas particularly, the approval may rest on authority that could be challenged, causing financial harm to the tribes, to the Federal Government as trustee, and to the individual companies involved. S. 1894 clarifies the right of tribes to enter into such agreements and also provides for Secretarial review of existing non-lease agreements to be sure they meet the purposes of this Act, or comply with the provisions of any other applicable law.

SEC. 1 (a): Provides that any Federally recognized Indian tribe may develop its tribally owned minerals through various types of negotiated agreements. This section is similar to section 1 of S. 1894 as introduced but clarifies that the bill's authority extends to those tribes who are recognized by the Federal government. Further, the section includes any minerals owned by a tribe, not just those on reservation or trust lands. Thus, tribes owning fee lands with underlying mineral rights can negotiate for the development of such minerals, as can tribes owning mineral rights but not surface rights. The types of permissible agreements are also more clearly identified by the use of terms commonly used in the parlance of the mineral industry but the enumeration of agreements is not meant to restrict the types of agreements that can be entered into.

This section also provides that the Secretary may promulgate regulations governing the terms and conditions of agreements. It is anticipated that such regulations will require a showing by a tribe that it has solicited offers from more than one development company to insure competition and fair remuneration. Regulations may also require a showing that negotiations truly represent arm's length bargaining and that the agreement provides for periodic renegotiation of contract terms, if applicable. Regulations should be broad enough to insure maximum flexibility for tribes in negotiating contract terms. As to any proposed non-lease agreements submitted to the Secretary for approval before the date of enactment of this Act, the Secretary is not precluded by this section from approving any such non-lease agreement prior to adoption of final regulations, providing his approval of an agreement includes a finding that the agreement is in the best interest of the tribe as provided in section 1 (b) and (c).

(b) Provides that, unless the Secretary finds an agreement is not in a tribe's "best interest", he shall approve it within 180 days of submission or 30 days after compliance with NEPA, whichever is later. Originally, the approval period was 1 year but many tribes testified that this was much too long, particularly for oil and gas agreements, which may only require environmental assessments. On the other hand, completion of a full environmental impact statement for a coal development proposal, for example, may take longer than a year. Thus the

new language will shorten the time but will allow for whatever additional time may be necessary to meet NEPA requirements.

In the event an agreement is not approved within the prescribed time limit, any party may seek a writ of mandamus to compel the Secretary to act. Thus, agreements are not deemed to be automatically approved if the Secretary takes no action.

In determining the tribe's best interest, the Committee intends that the Secretary should assess, among other things, (1) recent, similar agreements—tribal, state and private—involving the same type of minerals, (2) the probability that production will occur, (3) the fair market value of the minerals that are the subject of the agreement, and (4) the social, environmental and economic impacts of development on the tribes.

It is the intent of the Committee that such agreements should be evaluated or the basis of the best interests of the tribe as a whole, giving due regard to the long term economic development and employment opportunities for Indian tribal members. The Committee is aware that a potential for conflict of interest may arise in the negotiation of contracts or agreements authorized by this Act. In evaluating an agreement for "best interests" of a tribe, the Committee intends that the Secretary assure that no one individual or faction of a tribe should gain an unfair advantage or be unjustly enriched at the expense of the remaining members of the tribe.

(c) Provides that the Secretary shall state his findings in writing to the tribe at least 30 days prior to making a final decision. This is a new provision recommended by the Department of the Interior to be sure that tribes are fully apprised of potential risks, as well as potential benefits. Having the opportunity to review the Secretary's findings in advance of a decision, tribes will have time to reassess and perhaps reconsider before final approval or disapproval.

(d) (1) Upon disapproval of an agreement by the Secretary, gives parties to an agreement standing to bring suit in Federal district court.

(2) Gives the federal district court jurisdiction to review cases *de novo*, the Secretary's action.

(3) Provides for expedited review cases brought under this section.

(4) Provides for assessment of reasonable attorney and litigation fees if the complainant prevails.

Section 1 (d) is new and replaces the Presidential review provision of S. 1894, as introduced. While there are existing administrative review procedures, the Committee prefers expedited judicial review for several reasons. First, the only appeal available within the administration would, in reality, be a review by the Secretary of his own decision, though made by Departmental personnel under delegated authority. Second, time is often of the essence in contracts involving minerals production and a cumbersome and lengthy administrative review, followed perhaps by a lengthy court review, would work against the timeliness of the agreement. Last, Indian tribes have often experienced frustration in their attempts to make their own decisions. The Department of the Interior, the very agency that is responsible for the advancement of Indian tribes, is often regarded as a roadblock to tribal self-determination. This negative experience argues for an-

other avenue for redress if a tribe is dissatisfied with the Secretary's decision.

SEC. 2. Provides that individual allottees owning trust minerals may join with a tribe in an agreement. The former section 2(b) was deleted because considerable testimony was presented to the effect that individuals are not adequately protected now under competitive bidding requirements. They are often subject to intimidation and misleading promises made by unscrupulous representatives of some energy companies. The BIA has done a very poor job as trustee for these individuals and a provision allowing for direct negotiations between an individual and energy company representatives would further exacerbate an already serious problem. The Committee understands the need to allow allottees more flexibility than they now have, particularly those groups of allottees who want to block their land for mineral production and have competent negotiators to represent them. However, at this point, there is no sure way to devise such flexibility while at the same time insuring the protection that allottees need and are even now not receiving. It is, of course, expected that tribes are in the best position to protect their own members from exploitation and thus this section does retain the Secretary's authority to approve the inclusion of allottees in a tribe's negotiated agreement.

SEC. 3. Provides for Secretarial review of certain existing non-lease agreements to be certain that they comply with the purposes of this Act and other provisions of law. This review is provided to insure that those non-lease agreements now in place are in the tribe's best interest and that the tribe actively desired to enter into such agreement. Such review must be completed within 90 days of enactment of this Act.

SEC. 4. Provides that the Secretary, at the request of a tribe or individual, shall make available independent expert advice on all phases of mineral development and that costs may be recovered under existing law. This section is new and was included at the request of many witnesses who testified about the lack of expertise and assistance available to them. The Secretary has discretion, at the request of a tribe, to contract with private sources to provide such technical assistance and discretion to recover some of the costs of such assistance in the event that production of minerals results in revenue or proceeds to a tribe or individual.

SEC. 5. Provides that the bill does not affect the validity of any lease under the 1938 Indian Mineral Leasing Act, whether entered into before or after enactment of this Act.

SEC. 6. Provides that regulations shall be promulgated within 180 days and that tribes and organizations with mineral expertise shall be included in the formulation and amendment of such regulations. As noted in the discussion of section 1(b) above, issuance of regulations is not to be interpreted to affect the effective date of this Act and pending agreements can be approved prior to issuance of final regulations. The Committee included the provision for consultation with tribes and organizations to help insure that regulations are in accord with the realities facing tribes seeking to engage in non-lease ventures.

COST AND BUDGETARY CONSIDERATION

The cost estimate for S. 1894, as amended, as provided by the Congressional Budget Office is outlined below:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, D.C., May 20, 1982.

Hon. WILLIAM S. COHEN,
Chairman, Select Committee on Indian Affairs, U.S. Senate, Senate Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed S. 1894, a bill to permit Indian tribes to enter into certain agreements for the disposition of tribal mineral resources, and for other purposes, as ordered reported by the Senate Select Committee on Indian Affairs, May 13, 1982.

Based on this review, it is expected that enactment of this bill would not result in any additional cost to the government. The bill would allow any Indian tribe to enter into joint venture agreements for the disposition of natural resources in its possession, subject to the approval of the Secretary of the Interior. The bill also provides for specific appeals procedures should the Secretary disapprove any venture proposed.

Should the Committee so desire, we would be please to provide further details on this estimate.

Sincerely,

RAYMOND C. SCHEPPACH
(For Alice M. Rivlin, Director).

REGULATORY IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill.

S. 1894, as amended, will require that regulations be promulgated but they will apply only to those tribes with mineral resources that seek to negotiate development agreements and will thus affect only a very specific and small population. Therefore the Committee believes that S. 1984 will have no substantial regulatory or paperwork impact.

EXECUTIVE COMMUNICATIONS

The Committee received the following Executive communication from the U.S. Department of the Interior giving the Administration's views on S. 1894:

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D.C., March 15, 1982.

Hon. WILLIAM S. COHEN,
Chairman, Select Committee on Indian Affairs, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This responds to your request for our views on S. 1894, "To permit Indian tribes to enter into certain agreements for the disposition of tribal mineral resources, and for other purposes."

We recommend that the legislation be enacted if amended as suggested herein.

S. 1894 would allow any Indian tribe to enter into any joint venture agreement or other agreement described in the first section of the bill approved by the Secretary of the Interior for the disposition of oil and gas, geothermal, or other mineral resources of tribal lands, or for the sale of production from operations on tribal lands. Such agreements would conform to regulations prescribed by the Secretary. The Secretary would approve any agreement within one year of submission unless the Secretary found that the agreement was not in the best interest of the tribe. Upon disapproval, the Secretary would state his findings in writing within thirty days of his decision. The tribe would then have thirty days in which to file a request for Presidential review of the decision.

S. 1894 would also provide that individual Indians owning trust or restricted minerals within the boundaries of a reservation subject to an agreement entered into pursuant to the Act may join in the agreement with the tribe, subject to Secretarial approval. The Secretary, at his discretion, could also approve joint venture agreements or other agreements for individual Indians owning trust or restricted minerals.

Finally, S. 1894 would ratify, as of its date of enactment, agreements of the types described in the first section that were approved prior to enactment and would provide that enactment of this legislation, would not affect the validity of any lease previously approved or approved after enactment pursuant to the Act of May 11, 1938. It would also direct the Secretary to promulgate rules and regulations to implement the above provisions within 180 days of its enactment.

At the present time, the most frequently used authority for the deveolpment of Indian tribal mineral resources is the Omnibus Indian Mineral Leasing Act of May 11, 1938 (52 Stat. 347; 25 U.S.C. 396a *et seq.*). Section 396a of title 25 permits the leasing of tribal land for mining purposes for a term not to exceed ten years and so long thereafter as minerals are produced in paying quantities. Leases are executed by the tribe subject to the approval of the Secretary. Section 396a requires, in most instances, that oil and gas leases be offered for sale by advertisement followed by competitive bidding.

We believe that the maximum term for leases prescribed by section 396a is undesirable for two reasons. First, with many mining leases, the ten year exploratory period is insufficient for development to begin. Second, the "production in paying quantities" clause, in effect, gives lessees a perpetual lease when minerals are discovered. This latter aspect was identified as a major problem with current leasing practices for tribal lands by the American Indian Policy Review Commission in its "Report on Reservation and Resources Development and Protection," Task Force Seven, Final Report to the American Indian Policy Review Commission, 48 (1976).

Experience has shown that the requirement in section 396a of competitive bidding for the leasing of tribal oil and gas does not always work to the advantage of the tribes. Certain tribes which have been able to negotiate oil and gas development agreements appear to have received greater compensation than they had been receiving under competitive bidding. Since the bill does ont eliminate the current 1938 Act requirement for competitive bidding procedure for oil and gas development on tribal land before other types of agreements can be made, both tribes and allottees would have the option of negotiation or competitive

bidding under the procedures envisioned for implementation of S. 1894. Competitive bidding would continue to be required for most tribal oil and gas leases issued under the authority of the 1938 Act.

The most serious problem with section 396a, however, is that it authorizes development of tribal oil and gas resources only by leasing, ignoring the possibility of joint ventures, joint production agreements, risk service contracts and other non-lease ventures which are commonly used in mineral development today. Such non-lease ventures can provide the vehicle by which tribes can become directly involved in management decisions. The normal lease arrangements merely turns over responsibility for all development decisions to the lessee. The bill would facilitate tribes' direct involvement in such decisions, thereby enabling them to gain management experience and contributing significantly to the goal of self-determination.

Since 1975, the Department has approved a number of non-lease ventures involving the development of mineral resources, pursuant to section 81 of Title 25 (R.S. section 2103). The section requires the approval of the Secretary of the Interior and the Commissioner of Indian Affairs for contracts for services relative to Indian lands. We believe section 81 is inadequate to solve the problems posed by the 1938 Act discussed above. First, because section 81 does not apply to leases, it leaves intact the limitations in the 1938 Act. Second, the approval procedure for non-lease ventures under section 81 requires a rather cumbersome case-by-case analysis to determine whether the document submitted for approval is a service agreement within the purview of section 81 and does not convey a leasehold estate within the purview of the 1938 Act, or an interest in land within the purview of the Indian Non-Intercourse Act (R.S. 2116; 25 U.S.C. 177). Third, with the proliferation and hybridization of non-lease ventures, it is increasingly difficult to make the determination described. Without clarification of the Secretary's authority and ratification of existing ventures, some non-lease ventures previously approved may be called into question. Moreover, because of the confusion concerning the Secretary's authority to approve non-lease ventures the Department is reluctant to approve a number of proposed agreements which are pending.

We believe that enactment of S. 1894 with our proposed amendments would provide a means for the United States to promote tribal self-determination in the development of Indian mineral resources. The bill would leave to regulations the establishment of maximum terms for, the conditions of, and the manner of entering into non-lease agreements. We support this procedure because it permits the authority granted by the legislation to adapt to changes in the minerals industry and to respond to the particular requirements of numerous types of non-lease ventures.

We would like to offer, however, the following recommended amendments.:

1. Section 1(a) authorizes tribes to enter into joint ventures for the disposition of "oil and gas, geothermal or other mineral resources" of tribal lands. We are advised that a number of recent cases have interpreted similar language quite narrowly, *e.g.*, a reference to oil, gas and other minerals was held to apply only to energy minerals under the principle of *ejusdem generis*. In order to prevent such an interpretation and to clarify the legislative intention that the bill applies to

all mineral resources, we suggest that line 1 of page 2 be amended to read "of oil and gas, geothermal, coal, or other energy or nonenergy mineral resources. . . ."

2. Section 1(a) provides for approval within one year by the Secretary of any agreement submitted to him unless the Secretary finds it is not in the best interests of the tribe. We do not believe the Secretary should be bound to approve an agreement within one year of submission because in many instances, compliance with requirements of the National Environmental Policy Act (P.L. 91–190; 83 Stat. 852), as amended, would take more than a year. In addition, the current language could be construed as giving automatic approval within one year. Such an automatic approval may not be in the best interests of Indian mineral owners. Therefore, we recommend that this be clarified.

3. Section 1(b) provides for "Presidential review" of disapproval of a tribal proposal. We are not aware of any statutory requirement or procedures for such a review. Lease approval decisions are normally made by BIA field officials under delegated authority. Thus, administrative review procedures currently exist, and we believe those should be followed. We therefore recommend that the second sentence of section 1(b) be deleted from the bill.

4. One of the purposes of S. 1894 is to provide for legislative ratification of certain Indian mineral resources development agreements previously approved by the Secretary. As noted above, since 1975 the BIA has approved a number of tribal mineral development agreements which did not purport to be leases, and thus were not treated as being subject to the 1938 Act. Since questions remain about the adequacy of the Secretary's authority to approve such non-lease mineral development agreements, there is a need to ratify these past agreements which were approved in good faith and at the urging of the affected tribes. Section 3 of S. 1894 was no doubt designed to achieve this purpose by ratifying all prior "agreements of the type described in the first section of this Act." However, this language is unnecessarily broad since section 1 of S. 1894 also authorizes leases. As a result, all past leases of tribal minerals which may have been approved by a BIA official would be ratified by S. 1894—no matter how old or legally defective the lease may be. We are certain this result was not intended. To narrow the scope of this ratification provision, we recommend the following language:

"Sec. 3. Any agreement for the development of tribally owned minerals (1) which was previously approved by the Secretary or his authorized delegate, between January 1, 1975, and the date of the enactment of this Act, and (2) which did not purport to be a lease when it was presented to the Department of the Interior for approval, is hereby considered approved as of the date of such previous approval.".

Use of the phrase, "did not purport to be a lease," is designed to avoid future inquiries over whether one of the agreements approved during 1975–1981 was or was not a lease, the very inquiry which this legislation makes unnecessary for all future tribal mineral development agreements. We believe less than a dozen approved agreements fall within the scope of this proposed alternative language for section 3.

5. Section 4 of the bill requires that the Secretary promulgate rules and regulations to implement the Act within 180 days. We suggest

that the phrase "of the date of enactment of this Act" could be added. More important, we believe the legislative history should indicate that this requirement is not to be interpreted to affect the effective date of the Act, and that the Secretary is not precluded from approving any proposed agreements pending in the Department on the date of enactment until final rules and regulations have been adopted.

6. We believe that a provision should be added to the bill holding the Secretary harmless in the event a tribe suffers damages alleged to have arisen as a consequence of approval by the Secretary of an agreement authorized by this legislation. The kinds of tribal profit-sharing agreements envisioned by S. 1894 may involve substantial risks which we understand tribes would be willing to assume to provide an opportunity to maximize tribal profits and control over operations. Since the Secretary will be advising tribes on the consequences of these agreements, pursuant to his approval authority, we believe it is the tribes, as the parties to these agreements, who should assume the risks, and that the federal taxpayer should not be a guarantor of the wisdom of the tribes' and the Secretary's business judgment. Accordingly, we also believe that the Secretary should be required to make findings concerning the best interest of the Tribe whether he approves or disapproves a lease. These findings should be stated thirty days before his final decision is made, in the event that a tribe might want to reconsider entering into an agreement as a result of those findings. We therefore recommend that section 1(b) be amended to read as follows:

"(b) Whenever the Secretary approves or disapproves an agreement pursuant to subsection (a), he shall state his findings in writing at least thirty days before making his decision. Such findings shall be made available to the tribe, but shall otherwise be considered exempt from disclosure under the Freedom of Information Act.".

The provision for exemption from disclosure under the Freedom of Information Act would insure that a tribe is not done competitive harm by the release of an economic assessment of its proposed agreement, transmitted in confidence and exclusively for the tribe's benefit.

We also recommend that the following new section 6 be added:

"Sec. 6. No provision of this Act shall be construed to constitute a jurisdictional act, to confer jurisdiction to sue, or to grant implied consent to any person or Indian tribe to sue the United States or any of its officers for any damages alleged to have arisen as a consequence of an approval by the Secretary of the Interior pursuant to section 1 of this Act.".

The Office of Management and Budget has advised that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

KEN SMITH,
Assistant Secretary.

CHANGES IN EXISTING LAW

In compliance with subsection 12 of Rule XXVI of the Standing Rules of the Senate, the Committee notes that no changes in existing law are made by S. 1894, as amended.

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